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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1929.

No. 54.

Interstate Commerce Commission,
Petitioner,

vs.

United States of America, at the Relation of The City of Los Angeles,
Respondent.

Brief of Amici Curiae on Behalf of Southern Pacific Company, Southern Pacific Railroad Company, Los Angeles & Salt Lake Railroad Company and The Atchison, Topeka and Santa Fe Railway Company.

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TOPICAL INDEX.

PAGE

STATEMENT 5

ARGUMENT 10

A.

CONGRESS ITSELF HAS NOT (AND, THEREFORE, CANNOT DELEGATE TO ITS COMMISSION) POWER TO REQUIRE THE DOING OF WHAT THE COMMISSION WAS ASKED TO REQUIRE IN THESE PROCEEDINGS..... 10

I.

The Provisions of the Fifth Amendment to the Effect That No Person Shall Be Deprived of Life, Liberty, or Property Without Due Process of Law, and That Private Property Shall Not Be Taken for Public Use Without Compensation, Protect Corporations as Well as Natural Persons..... 10

II.

To Require These Carriers to Do What the City Demands of Them Would Be a Violation of the Provisions Above Referred to of the Fifth Amendment 11

III.

Opinions of State Courts Which Have Been Cited as *Contra* to Our Position Are Either Not in Point or Are Contrary to Decisions of This Court..... 25

IV.

Cases Heretofore Cited by the City From the Reports of This Court Are Not in Point..... 31

V.

The Railroad Companies Have Not Admitted That the Interstate Commerce Commission Could Within the Limitations Imposed by the Fifth Amendment Be Vested With the Jurisdiction Which the City Claims That the Commission Possesses..... 32

VI.

Conclusion as to Limitations Under Fifth Amendment 33

B.

THE CONGRESS HAS NOT ATTEMPTED TO DELEGATE TO ITS COMMISSION THE POWER TO DO WHAT THE CITY ASKED THE COMMISSION TO DO..... 34

PAGE

I.

The Act to Regulate Commerce Must, if Possible, Be so Construed as to Avoid a Difficult Constitutional Question, Namely the Question of Power Under the Limitations of the Fifth Amendment 34

II.

Paragraphs 18 to 20 of Section 1 of the Act to Regulate Commerce Do Not Confer Upon the Commission Any Such Power 35

III.

Paragraph 21 of Section 1 Is Not a Source of the Asserted Jurisdiction 36

IV.

The Commission Has No Authority Under Paragraph 3 of Section 3 of the Interstate Commerce Act to Order the Carriers to Construct a Union Passenger Station 39

V.

Paragraph 4 of Section 3 Does Not Give the Commission Power to Make the Desired Order 45

VI.

To Hold That the Transportation Act of 1920 Has Deprived States of Any Power That They May Have Had to Do What Is Here Sought Is Not Tantamount to Holding That the Power Has Been Given to the Interstate Commerce Commission 51

VII.

The Court in Railroad Commission v. Atchison, etc., 264 U. S. 331, Did Not Hold That the Interstate Commerce Commission Had the Jurisdiction Here in Question 58

VIII.

The Ruling Made Against Its Own Jurisdiction by the Interstate Commerce Commission Is Entitled to Great Weight 63

APPENDIX.

Following page 66

TABLE OF CASES AND AUTHORITIES CITED.

PAGE

Atchison v. California Railroad Commission, 173 Cal. 577 ..... 13, 14, 15
Atchison v. Railroad Commission, 190 Cal. 214, ... 17, 25, 30
Atlantic C. L. v. Riverside, 219 U. S. 186 11
Charleston etc. v. Varnvill, 237 U. S. 597 55
Chesapeake v. Stapleton, Oct. Term 1928, No. 133 53
Chicago etc. v. State, 90 Okla. 173 29
Chusan, Fed. Cases 2717, 5 Fed. Cases 680 56
City of Los Angeles v. R. R. Co.s, 142 I. C. C. 489 59
Civic Center Case, 175 Cal. 441 25
Cleveland v. United States, 72 Law Edition 166 36
Corporation Comm. v. Seaboard etc., 161 N. C. 270 28
Del Mar Case, 167 Cal. 666 13
Denver & Rio Grande v. City etc. of Denver, 250 U. S. 241 32
Dewey v. Atlantic Coast Line, 142 N. C. 392 28
Erie v. People, 233 U. S. 671 ..... 53, 56
Griffin v. Southern Ry., 150 N. C. 312 28
Gulf, Colorado & Santa Fe v. State, 167 S. W. 192 29
Hayes v. C. M. & St. P., 69 I. C. C. 489 50
Hollywood Case, 192 Cal. 307 ..... 13, 14, 16, 22, 23, 24, 26
Houston v. Moore, 5 Wheaton 1 56
Kansas City v. Van Zant, 260 U. S. 459 54
Louisville v. I. C. C., 184 Fed. 118 37
Lunham v. Railroad Co., 48 I. C. C. 611 37
Mayor and Aldermen v. Norwich etc., 109 Mass. 103 27
Michigan v. Duke, 266 U. S. 570 24
Missouri Oil & Gas Co. v. State, 29 Okla. 640 28
Missouri Pac. v. Porter, 273 U. S. 341 56
Municipal League v. S. P., 20 Op. & Ord. Cal. R. R. Com. 937 6
Napier v. Atlantic Coast Line, 272 U. S. 605 56
New York Central v. Winfield, 244 U. S. 147 55
North Carolina etc. v. Southern, 135 N. C. 435 29
Northern Pacific v. Dustin, 142 U. S. 492 28
Nor. Pac. Ry. v. Washington, 222 U. S. 370 53
O. W. R. & N. v. Fairchilds, 224 U. S. 510 24
Pacific Telephone etc. Co. v. Eshelman, 166 Cal. 640 ..... 13, 16, 20, 27

PAGE

Penn. v. Mahon, 260 U. S. 393 11
Pennoyer v. McConnaughty, 140 U. S. 1 63
People v. Stephens, 197 N. Y. 1 19
People v. Stevens etc., 203 N. Y. 7 20
Prigg v. Penn., 16 Pet. 539 52
Railroad Com. v. Alabama etc., 182 Ala. 357 26
Railroad Comm. of Alabama v. Alabama etc., 185 Ala. 354 26
Railroad Commission v. S. P., 264 U. S. 331, 4, 30, 32, 43, 58
Railroad Tax Cases, 13 Fed. 722 10
St. Louis etc. v. U. S., 245 U. S. 136 11
St. Louis v. Hesterly, 228 U. S. 702 57
Santa Clara v. S. P., 18 Fed. 385 10
San Mateo v. S. P., 13 Fed. 145 10
Scofield v. Lake Shore, 2 I. C. C. 67 42
Sinking Fund Cases, 99 U. S. 719 11
Smithson v. Atchison, 174 Cal. 148 52
Sou. Ry. v. R. R. Commission, 236 U. S. 439 56
State *ex rel.* R. R. Commissioners v. Atlantic Coast Line, 67 Florida 441 31
State v. Jacksonville Terminal, 71 Fla. 295 30
State v. K. C. Railway Co., 32 Fed. 722 29
State v. St. Louis, 165 S. W. 491 29
State v. St. Louis etc., 199 S. W. 829 29
Superior Water Co. v. City, 263 U. S. 125 27
Texas v. Gulf etc., 270 U. S. 266 35
Texas v. Eastern Texas, 258 U. S. 204 35
Towers v. United Rys., 126 Md. 478 19
Union Station Case, 100 I. C. C. 421 ..... 4, 37, 41, 44
United States v. D. L. & W., 40 Fed. 101 42
United States v. D. & H. Co., 213 U. S. 366 (408) 34
United States v. Pennsylvania, 242 U. S. 208 41
U. S. *ex rel.* Arant v. Lane, 249 U. S. 367 65
U. S. v. Cerecedo etc., 209 U. S. 338 63
U. S. v. Reynolds, 250 U. S. 104 63
U. S. v. Standard etc., 251 U. S. 210 35
Vicksburg v. L. A., 160 L. A. 1028 ..... 12, 18
Wisconsin etc. v. Jacobson, 179 U. S. 287 31

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This brief is tendered by friends of the court who are members of the bar of the court and who were attorneys for the above-named carriers in the proceedings before the Interstate Commerce Commission, out of which the present proceedings arose. These carriers are therefore directly interested in this proceeding, and it is a subject of general interest, and so we submit our argument on two propositions:

First: That the Congress cannot confer on the Commission jurisdiction to do what the City seeks to have done.

Second: That the Congress has not attempted to confer such jurisdiction.

The Commission rests its case wholly on the latter proposition, not suggesting the first. We suggest it, not because we think that the case depends upon it, but rather to demonstrate that the construction of the law made by the Court of Appeals would require the solution of a delicate and difficult question of constitutional law.

A case arising out of the endeavor to compel the construction of a union station in Los Angeles was before this Court in *Railroad Commission v. So. Pac. Co.*, 264 U. S. 331. After the opinion was handed down in that case and after the Commission had rendered its opinion in these union depot proceedings, 100 I. C. C. 421, the state commission again entered an order commanding the railroads to establish a union station. Thereupon the railroads petitioned the Supreme Court of the state of California for a writ of *certiorari* to review this last action of the state commission and the writ issued. The carriers had hoped that the Supreme Court of the state would render judgment in that case and that the defeated party would endeavor to bring the proceedings again into this court, so that those proceedings and the constitutional questions there involved might be before this court and possibly consolidated with the present proceedings for a final determination of all the questions involved.

But the Supreme Court of the state upon the handing down of the opinion in these proceedings by the Court of Appeals of the District of Columbia, set aside the submission of the case, and took it off the calendar pending the final determination of this case in this court.

N. B. Figures in brackets refer to pages of transcript except where context indicates a different reference.

STATEMENT.

The gist of the petition for mandamus is in the twelfth paragraph [12-13], where it is alleged that the City filed a complaint with the Commission, and where, by reference to Exhibit A [29], that complaint is made a part of the petition. Manifestly the jurisdiction of the Commission and the correctness of its ruling as to its jurisdiction must be determined upon the record which was made before the Commission. It is, therefore, necessary to examine the complaint filed with the Commission and also the petition for final order [115-128] to ascertain, if possible, whether or not a case within the competence of the Commission was presented.

That complaint was a printed document of 167 pages, together with certain maps and diagrams. All but some 30 pages consisted of exhibits, made part of the complaint by reference and not reproduced in the record here.

That complaint alleges in paragraph II [2] that each of the defendants is a common carrier by rail engaged in interstate as well as intrastate commerce and doing business in and out of and through the City of Los Angeles. The lines of railway are shown on a map made a part of the complaint [28-29]. This map shows that the

existing Southern Pacific passenger station is about one mile from the site proposed for the union station; the Salt Lake terminal about the same distance from that site, and that the Santa Fe passenger station is a somewhat less distance from the same site. It is alleged that the Salt Lake depot is inadequate, that the Santa Fe depot provides scant facilities. It is not alleged that the Southern Pacific depot is in any wise inadequate, but it is alleged that the use of that depot "does not conform to any satisfactory plan for the elimination of the dangerous railroad grade crossings on said Alameda street and elsewhere" [32, 33]. And that quotation is substantially a repetition of a statement made in the opinion of the California Railroad Commission in its decision No. 9338, 20 Opinions and Orders 937.

All these passenger terminals lie southwardly from the proposed site, which is on the west side of the Los Angeles River, on the same side with the Southern Pacific and Santa Fe stations, while the Salt Lake station was on the east side of the river. We say "was" because after the complaint had been filed, and before the petition for final order was filed, the Salt Lake station was damaged by fire, and since that time that line has been temporarily using the Southern Pacific station [5, 108]. There is an allegation [9] that at a certain hour of the day the patrons of the two lines overcrowd the concourse of the Southern Pacific station. But there is no allegation anywhere that the station is not ample for the business of the Southern Pacific alone. See also page 60.

Main tracks of the Santa Fe lie near, but not on the site of the proposed station. In order that Santa Fe trains might enter the proposed station shown on the

diagram [128-129], that company would have to lay trackage into the station from its main tracks along the west bank of the river near Aliso street; the Salt Lake must either enter the station by bridging the Los Angeles River near Aliso street or must arrange with the Santa Fe to use the latter's trackage in and out of the station from some point south, probably Hobart Junction, about four miles from the proposed station, and from near Broadway bridge south to the station, a distance of about one mile. The Southern Pacific must take its north and south trains from a point near the Broadway bridge to and from the station on new tracks or must arrange with the Santa Fe to use about one mile of the latter's tracks. The Southern Pacific trains running between Los Angeles and El Paso must be deflected from Alhambra avenue east of river, and brought into the station on a bridge to be built near Aliso street.

The petition [25] assumes that joint use would be ordered or arranged for. We quote, adding in brackets a few distances:

> "That the carrying into effect of the union passenger depot order requested by the City of Los Angeles, as aforesaid, would require to a substantial extent the joint use of existing railroad terminal facilities in or adjacent to the City of Los Angeles, including the following uses:
>
> "The use by the Southern Pacific passenger trains from the north of the Santa Fe main line tracks on the west bank of the Los Angeles River from a point north of the Broadway viaduct as far south as Aliso street [one mile];
>
> "The use by the Salt Lake passenger trains from Pasadena of the Santa Fe tracks on the west bank of the river between the same points [one mile];

"The use by the Salt Lake passenger trains from the south of the Santa Fe tracks from Hobart Junction on the south to the site of the proposed union passenger depot on the north, a total distance of approximately three miles [four miles]; and

"The use by the Southern Pacific of the Salt Lake's tracks on the east bank of the Los Angeles River from Alhambra avenue southerly to Butte street and thence west over the Salt Lake's Butte street line to Alameda street" [four miles].

The program also includes the abandonment by the Southern Pacific of the operation of train service on Alameda street between College street on the north and 15th street on the south, approximately three miles [46].

The land on which the proposed station would be built is some 37 acres in extent [25]. There are now no railroad tracks on it except the Southern Pacific tracks on Alameda street, which are not to be used and could not be used in connection with the proposed station. [Diagram, 128-129.] Nothing in the record before the Interstate Commerce Commission showed or tended to show that any of the land within the proposed site is, was, or ever had been dedicated to any public use, but a part of it is owned by the Southern Pacific Company, which is the lessee and operator of the railroad facilities of the Southern Pacific Railroad Company. The latter company owns no part of the thirty-seven acres above referred to. In the petition for mandamus [25] the part of the acreage owned by the Southern Pacific is denominated "railroad terminal land."

It is true, also that paragraph XXI of the petition [27] says:

"That whenever this petition contains an allegation on a question of fact or a reference to any

finding of fact made by the Interstate Commerce Commission or by the California Railroad Commission, such fact appears and is shown by the evidence in the record before the Interstate Commerce Commission in said Docket No. 14778."

The Commission in its answer [150-156] has not referred to the allegation that a part of the site is already "railroad terminal land." Otherwise we can find no allegation and no intimation anywhere in the record that in any paper or proceeding before the Interstate Commerce Commission was it ever alleged or attempted to be shown that one foot of the 37 acres was "railroad terminal land," whatever that phrase may mean. All that the state Commission could say was [104]:

> "A large portion of this particular site is already owned by the Southern Pacific Company."

Even this mere ownership is not mentioned by the Interstate Commerce Commission in its report in May, 1928 [128 to 147]. Nor was this fact of ownership mentioned in the city's petition for final order [115 to 128], except as that petition included as an exhibit a copy of the state Commission's opinion containing the language last above quoted.

So then what the Commission was asked to do, which it held that it had no jurisdiction to do, was this:

Order the three lines to dedicate to public use some 37 acres of land a mile from the present station of the Southern Pacific and the Salt Lake companies, and nearly a mile from the Santa Fe station; erect on that land a passenger terminal, including about four miles of tracks in the station yard, and buildings as shown on the diagram already referred to; build or get use of trackage

necessary to use this station, namely, joint use by the Southern Pacific of Santa Fe tracks about one mile in length; joint use of Santa Fe tracks by the Salt Lake some five miles in length; joint use by the Southern Pacific of Salt Lake tracks some four miles in length; build a bridge across the river to carry the tracks of the Southern Pacific and possibly the tracks of the Salt Lake, and maintain and operate the plant as a union passenger station, abandoning the existing separate stations. All at a cost of at least ten million dollars [137-8].

And it was *vis-a-vis* these facts that the Interstate Commerce Commission said in May, 1928 [139]:

> "The distinction between a simple switch connection such as was contemplated by the cases previously referred to, and the *elaborate facilities* sought to be required by us in the present case, is obvious." (Italics ours.)

ARGUMENT.

A.

CONGRESS ITSELF HAS NOT (AND, THEREFORE, CANNOT, DELEGATE TO ITS COMMISSION) POWER TO REQUIRE THE DOING OF WHAT THE COMMISSION WAS ASKED TO REQUIRE IN THESE PROCEEDINGS.

I.

The Provisions of the Fifth Amendment to the Effect That No Person Shall Be Deprived of Life, Liberty or Property Without Due Process of Law, and That Private Property Shall Not Be Taken for Public Use Without Compensation, Protect Corporations as Well as Natural Persons.

Railroad tax cases, 13 Fed. 722 (746); Santa Clara v. S. P., 18 Fed. 385 (402); San Mateo v. S. P., 13 Fed.

145 (151); St. Louis S. W. v. U. S., 245 U. S. 136; Sinking Fund cases, 99 U. S. 719; Atlantic Coast Lines v. Riverside, 219 U. S. 186.

We understand that this proposition is not contested and we leave it without argument. The cases cited from reports of this court do not rule on the proposition but assume it to be true.

II.

To Require These Carriers to Do What the City Demands of Them Would Be a Violation of the Provisions Above Referred to of the Fifth Amendment.

Cases closely in point and decided under the Fifth Amendment are few. We shall use, for the most part, cases that turn on the corresponding provisions of the Fourteenth Amendment.

Penn. v. Mahon, 260 U. S. 393.

Suppose that Congress should pass a special act ordering these three railway companies to abandon their existing passenger stations in Los Angeles, create and maintain a union passenger station in that city, and build necessary trackage and use one another's tracks so far as needed to get in and out of the new station; ordering, also, the Southern Pacific to abandon train service on Alameda street, between College street and 15th street. On what theory of constitutional law could such an act be sustained? Of course, the only possible theory is that of an exercise of the police power; but that power has its limits although we may not be able to define them. In Penn. v. Mahon, 260 U. S. 393, the opinion contains the following:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment (citing cases). When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."

Manifestly a railroad which is now furnishing proper, adequate, convenient and sufficient station facilities cannot be required to tear down its station and erect another one merely because Congress might think the latter would be preferable.

Vicksburg v. La., 160 La. 1028.

Manifestly, also, a railroad cannot be required to provide an airport adjacent to its station even though Congress might think that this would greatly convenience the public. For this would be to compel the railroad to render a service which it has not undertaken to render. It would be a taking of private property for public use without compensation. So, too, even though the existing station facilities of a railroad be inadequate, this does not empower Congress to compel it to build a new station, at a new location, apart from its existing line of railroad, for this would also be requiring it to render a service which it has not undertaken to render.

The soundness of a claimed rule of law frequently may be tested by assuming its application to a concrete case. Let us then consider the case of the Santa Fe. It has a terminal in Los Angeles city. Its station buildings are

inadequate. Its terminal site is concededly adequate. Therefore Congress may compel it to provide adequate and convenient station facilities at its terminal site. But Congress cannot compel it to provide station facilities at San Fernando, in the northern part of the City of Los Angeles, and some fifteen or twenty miles from the Santa Fe's existing line; for the Santa Fe has not undertaken to render that service. No more can it be compelled to provide terminal facilities at Venice, or at Hollywood, merely because those communities happen to lie within the municipal corporation known as the City of Los Angeles, although several miles from any Santa Fe rails.

In other words, when a railroad establishes its terminal in a given city, it does not thereby undertake to move that terminal to any other point within that city which will in the opinion of Congress advantage the public convenience.

It will doubtless be urged by the City that the carriers have dedicated their property to an adequate passenger service in the City of Los Angeles, and hence are subject to regulation of that service in the public interest under the police power. But we insist that when a carrier establishes a terminal at Boyle Heights, in the eastern edge of the City of Los Angeles, it does not thereby undertake to move that terminal to Hollywood, in the west end of the City, if Congress should be of the opinion that public interest would be advantaged thereby. Telephone case, 166 Cal. 640; Del Mar case, 167 Cal. 666; Atchison Company case, 173 Cal. 577; Hollywood case, 192 Cal. 307.

Now, it is apparent at the outset that the "undertaking to serve" of a steam railroad is materially different from

that of such public utilities as domestic water companies, gas companies and electric light companies. A steam railroad does not undertake to go to the homes and places of business of its patrons to serve them. It undertakes only to serve those patrons who come to it. This distinction is important. It was recognized in the Atchison case, 173 Cal. 577 (585), and in the Hollywood case, 192 Cal. 307 (312).

But the City may say: "You have undertaken to serve the people of the entire City of Los Angeles." We answer no. We have undertaken to serve only those people of the City who come to our station, upon our line of railroad. This limitation is inherent in the very nature of a steam railroad and the method of its operation. It cannot go to the homes of its patrons; a water company or a gas company must go in order to serve its patrons. A street railway, in this respect, is midway between the steam railroads on the one side, and the gas company or water company on the other. It partakes somewhat of the characteristics of each. Surely the undertaking of the street railway, which enters a community to serve its people, is broader and more comprehensive than that of a steam railroad. Yet the court did not hesitate to hold in the Hollywood case, *supra,* that the undertaking of a street railway cannot be held to extend beyond the limits of the franchises which it has applied for and accepted. If the undertaking of a street railway is limited to its franchises, surely the undertaking by a steam railroad cannot be held to extend beyond them. Yet not one of these carriers can comply with this order without applying for and obtaining additional franchises which it has never sought nor desired.

It will be said that the City is not seeking to compel carriers to move their terminals to a distant part of the City, but is seeking to move them only one mile. But whether it be a mile, or five miles, or twelve miles, the rule of law is the same. In either case, it is equally beyond the power of Congress because it is an attempt to compel the carrier to undertake a service which it has never undertaken to render. In the Hollywood case, *supra,* some of the extensions sought were only one-half mile in extent and involved only a relatively small expense of extending a street railway track along a public street. The court had no hesitancy in holding that the street railway company could not be compelled to make even this short and comparatively inexpensive extension because it had not undertaken to render this service. The removal of a railroad terminal one-half mile in the heart of a great city may be vastly more burdensome and oppressive than the twelve-mile extension sought in the Atchison Company case, 173 Cal. 577.

But the principle is the same in either case. Once you concede that public authority may compel a public utility to expend money, in any amount, however small, in a service which it has not undertaken to render, there is no place to draw the line and you have opened the door to unlimited confiscation of private property.

To order these extensions, and to order the acquisition of the new land necessary for rights of way and the union station site and to order the dedication of these lands to public use and the construction thereon of a union passenger station building and some four miles of trackage, is confiscation of the property of the railroad companies and their several shareholders. It is not pre-

tended that any compensation is to be given to them for the forced investment of so great an amount of capital in such new enterprise, the carriers being left to such remuneration as they may be able to secure from rates they may be able to have established and to collect.

In the case of Pac. T. & T. Co. v. Eshleman, 166 Cal. 640, the court said at page 686:

> "It therefore stands admitted, as indeed it must, that for the taking no compensation whatsoever is made. And, of course, it cannot be contended and is not contended that an apportionment of rates or tolls for a service to be rendered in the future is a compensation for the present taking of property, and as little can it be said that the allocation of such rates and tolls to be earned in the future can ever measure up to the constitutional requirement that property shall not be taken without compensation first made and paid to the owner."

In the Hollywood case, 192 Cal. 307, the court said at page 310:

> "We entertain no doubt that neither the Railroad Commission nor any other governmental agency possesses such power."

As was said in Pac. T. & T. Co. v. Eshleman, 166 Cal. 640, at page 665, it may not be amiss to point out that devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would better be served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty.

In his concurring opinion, in this Union depot case, when it was before the state court, in Atchison v. California Railroad Commission, 190 Cal. 214, Chief Justice Shaw said, at page 228:

> "Entirely new tracks will have to be built to reach the new depot, and the land on which it is to be erected and on which the track is to be built will have to be acquired by the said companies, or by some subsidiary company in which they are all interested, and vast sums of money must be used in constructing the buildings and tracks required for the union depot. If this be true, it is equally beyond the power of the Interstate Commerce Commission to make the order. To require the railroad companies to construct this depot and the tracks necessary therefor is equivalent to ordering them to dedicate new property to a public use. I know of no power which will justify the state in commanding a railroad company to thus acquire and dedicate property to a public use."

Chief Justice Shaw's opinion in that case was followed by the same court in the Hollywood case, 192 Cal. 307.

The absolute duties of the carriers are limited to the furnishing of reasonable and adequate facilities to their several patrons. If a station is too small a railroad may be required to enlarge it. If a station burns down a railroad may be required to replace it. These are matters within the realm of the police power. These are but the carrying out of obligations incurred when the railway entered the field of its activity; but to require a railroad company to abandon its own adequate facilities and go elsewhere than on its own property and acquire additional land and construct new facilities to be used jointly by itself and another railroad company is outside the realm of regulation and is an infringement upon the constitutional right of the carriers.

The appellant seeks not to compel the carriers to make adequate facilities that are now inadequate, but requires abandonment of adequate facilities, at least, so far as the Southern Pacific Company is concerned. In Vicksburg v. Louisiana, etc., 160 La. 1028, which was an appeal from a judgment enforcing an order of the Commission requiring the erection of a new depot, the evidence showed that the existing depot was adequate although unsightly and not modern. The court, in a concise and clear opinion, held that the Commission had exceeded its jurisdiction.

It is recognized by the courts that there is a clear distinction between power to regulate and the right to manage. The management of the business of a corporation is a matter which must of necessity be left to the business sagacity of the owner if the corporations are to survive. It is clearly recognized that as long as such property is to be held in private ownership with the incidental risks attached to its use in the business, the right of management must remain incident to the ownership and does not pass to the government. Otherwise, the government would secure for the public benefit all the advantage of ownership without the incidental risk.

Even when the charter of a railroad corporation empowers it to make extensions into territory which it has not seen fit to enter, neither the state nor the Federal Government can compel such extension, for it is strictly a matter to be determined by the directors of the company whether it would be advisable; and as to the cost, feasibility, and advisability of raising the necessary capital for investment in the proposed venture. This was recognized and clearly stated in Towers *et al.* v. United

Railways, 126 Maryland 478. In that case it appeared that a street railway company had the right under its franchise to build the extension sought, but had never exercised that right. The Public Service Commission ordered the extension, basing its order "upon an obligation arising under the appellee's profession and undertaking to serve the territory designed to be served by the proposed extension, and upon its finding of fact that the extension would be remunerative to the appellee." The Supreme Court of the state granted relief to the railway company, and this decision was affirmed by the Court of Appeals of Maryland.

In People v. Stephens, 197 N. Y. 1, it was said that the commissioners could not assume the position of financial managers or substitute their judgment for that of the directors of the company. That case involved a refusal of the Commission to permit the issuance of securities for the purchase of railroad property which constituted an addition or extension to its existing service, but the principle involved is the same as in the present case, namely, that the question of the advisability of the issuance of securities for additions or extensions to service is primarily a matter for the judgment of the owners and directors of the company. The court in that case said at page 10:

> "We do not think the legislation alluded to was designed to make the Commissioners the financial managers of the corporation, or that it empowered them to substitute their judgment for that of the board of directors or stockholders of the corporation as to the wisdom of a transaction, but that it was designed to make the Commissioners the guardians of the public by enabling them to prevent the issue of stock and bonds for other than the statutory purposes."

The case last cited was quoted in the case of *People v. Stevens, etc.*, 203 N. Y. 7, where the court said at page 19 in regard to the powers of the Public Service Commission that its discretion could not override the discretion of the officers of the company in the management of its affairs or the provisions of the statute which prescribe the cases in which securities are permitted.

These authorities sustain, we submit, the proposition that the matter of investment of new money in additional enterprises is strictly a matter of corporation business policy to be left to the sound discretion of the directors, and may not be compelled by any governmental agency.

The jurisdiction of the regulatory bodies is limited to the regulation of enterprises in the public use to which the owner has itself dedicated the property. The courts have repeatedly held that the powers of railroad commissions are limited to regulation. Therefore a railroad line or extension, or a union station must be constructed before there is an object upon which this function of regulation may operate.

This limit on the powers of governmental agencies was pointed out in *Pacific Telephone etc. Co. v. Eshleman*, 166 Cal. 640. The court said at page 663, after stating that there are certain fundamental principles governing the exercise of the police power:

> "The first of these is that this power goes merely to the *regulation* of the public utility and that when an order passes beyond proper regulation it amounts to a taking of the property, and the order is then referable not to the police power but to the power of eminent domain."

The court further says at page 665:

> "This principle, it is to be noted, is not that the Legislature, acting directly or through its authorized mandatories, may not subject property devoted by its owners to a public use to another public use, or to the same public use by its rivals, but that the doing of this is an act referable to the power of eminent domain and not to the police power and that compensation must be made accordingly. Herein lies the vital distinction between the legitimate exercise of the police power and the exercise of the power of eminent domain. In the former, uncompensated obedience to the order is imperative. In the latter, the order may not be enforced without compensation first made. And, finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would better be served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty. Any law or order seeking to do this passes beyond the ultimate limits of the police power, however, vague and undefined those limits may be."

Therefore, we submit that the government is without power to order or compel the carriers and their stockholders to procure, say, ten million dollars and dedicate the same to public use extending their main lines and entering upon a traffic which they have no desire to undertake.

It will doubtless be urged that as the City has expressed a willingness to give the necessary franchises and permits therefore the railroads may be compelled to ask and

accept them; that if the railroads may be required to exercise the power of eminent domain to obtain necessary land for needed facilities, then they may also be compelled to acquire or accept such franchises as may be necessary for needed facilities. But the same fallacy which we have pointed out underlies this argument.

We admit that if the Santa Fe station building is too small for the proper accommodation of its patrons, the company may be compelled to enlarge its building, although in order to make such enlargement it might have to acquire new land in one way or another. But that is not to say that the company may be compelled to remove its station to a point not on its line, and acquire the permits or franchises necessary to accomplish such removal.

In the *Hollywood* case, *supra*, the decision went to the effect that an order compelling extension and service in a field not embraced within the limits of the enterprise of the carrier and not within the limits of its franchise was void and non-enforceable. In this respect steam railroad corporations are not essentially different from street railroad corporations.

The routes of steam railroads are to be set forth in their articles of incorporation under the state law of California. *California Civil Code,* Sec. 291 [Appendix 1]. Upon incorporation the company has the right to construct its railroad as defined in its articles. *California Civil Code,* Sec. 465, subdiv. 4 [Appendix 2]. It has the right to cross any public highway in California, Sec. 465, subdiv. 5 [Appendix 3], outside of incorporated cities or towns, Sec. 470, *California Civil Code* [Appendix 4]; in incorporated cities and towns under the limitations

placed by Sec. 470, no construction can take place without the grant of franchise by a two-thirds vote of the city authorities—that is for crossing or use of streets. The granting of a franchise always presupposes an application therefor by the one who would exercise the franchise. Therefore, whether or not a railroad corporation possesses franchise in any municipality in California becomes an important factor in ascertaining the extent of the company's obligation to serve the public. If the company does not hold a franchise allowing it to voluntarily construct extensions, there is no justification for saying that the company had impliedly undertaken to extend its line whenever it should become desirable from the standpoint of the government agencies—see *Hollywood v. Railroad Commission,* 192 Cal. 307 at page 313.

To create the proposed station several franchises will have to be secured by all petitioners. The Santa Fe will have to secure a franchise to cross Dominguez street, Commercial street, Aliso street, Center street, Vignes street and Lyon street. The Southern Pacific and Salt Lake roads will have to secure a franchise to cross the Los Angeles River, Center street, Vine street and Lyon street. The Southern Pacific will have to acquire a franchise for the relocation of Alameda street between Aliso and Los Angeles streets. And perhaps all of the carriers will have to acquire franchises to cross other streets at other locations, depending upon how it should be determined that access could be obtained to the proposed station site. *Session Laws of California,* 1925, page 1024 [Appendix 5]; *Constitution of California,* Section. 19, Article 11 [Appendix 6].

We submit that no governmental agency has authority to make any lawful order requiring railroad companies or their officers to apply for franchises or privileges which those corporations and their officers do not desire to exercise. As said in the *Hollywood* case, *supra,* the franchise rights of a street railroad are important in ascertaining the extent of the company's obligation to serve the public because they represent the authority which the company has asked for and obtained from the municipality—but where, as in the present case, the company does not hold franchises allowing it to voluntarily construct these extensions, there is no justification for saying that the company has impliedly undertaken to extend its line whenever it should become necessary.

So we say that the thing sought to be required here is beyond the absolute duty of the corporations. *O. W. R. & N. v. Fairchilds,* 224 U. S. 510 (529). In the *Hollywood* case the court announced the following conclusion:

> "We conclude, therefore, that Section 36 of the Public Utilities Act (Statutes of 1915, page 115), in so far as it seeks to confer jurisdiction upon the Railroad Commission to order a street railway company to extend its lines into a new territory in which it has no franchises, is ineffective for that purpose and to that extent void."

Michigan, etc. v. Duke, 266 U. S. 570, is analogous. This case involved the question whether the state might impose the duties and liabilities of a common carrier upon one engaged in performing a contract to transport merchandise for one manufacturer over the public highways from a plant within a state to a destination in another

state. The final paragraph of the syllabus, which is virtually a quotation from the opinion, says:

> "The conversion by a legislative fiat of property used exclusively in the business of a private carrier into a public utility and declaring the owner a public carrier is an unconstitutional taking of private property for public use without compensation."

III.

Opinions of State Courts Which Have Been Cited as Contra to Our Position Are Either Not in Point or Are Contrary to Decisions of This Court.

Even a cursory examination of the opinion in the *Civic Center* case, 175 Cal. 441, will show that the sole question considered and the sole question decided there was the question of jurisdiction over grade crossings as between the State Commission and the City of Los Angeles.

In *Union Station* case, 190 Cal. 214, it was not decided that except for the taking away thereof by the Transportation Act of 1920, the State Commission would have had the requisite authority to require these carriers to erect a union station. The petitioners in that case made two main contentions—first, that by the enactment of the Transportation Act of 1920 Congress had so occupied the field as to exclude the states from any power or control over union stations of interstate railroads, extension of lines, abandonment of operation, and use by one carrier of another's main line tracks; and, second, that an order requiring the erection of a union station where it would necessitate the extension of main line tracks, abandonment of operations and of adequate terminal facilities, acquisition of new property and dedica-

tion thereof to the public, was in excess of the police power and therefore was not within the power of any governmental agency. Manifestly a decision of either of those questions in favor of petitioners would determine the case and require the annulment of the Railroad Commission's order. The California court elected to consider and determine the first of these questions. The determination thereof favorable to the petitioners rendered unnecessary consideration of the remaining questions, as the court pointed out in saying, "This disposition of the primary inquiry involved in these proceedings renders unnecessary a discussion of the several subsidiary questions presented for our consideration by the briefs of counsel herein." 190 Cal. 227.

Mr. Chief Justice Shaw, in a concurring opinion, indicated that in his view the petitioners were equally correct in their second contention. And in the *Hollywood* case, 192 Cal. 307, the court in banc cited and adopted Chief Justice Shaw's language with unqualified approval.

Railroad Comm. of Alabama v. Alabama etc., 182 Ala. 357, was a suit by a carrier to enjoin the enforcement of an order requiring the construction of a union station. Evidently the proposed station was located at a point where three railroads converged and the order therefore did not involve the question of the power to compel an extension of lines by any carrier. At any rate, the question whether a carrier can be compelled to extend its tracks for a union station was not discussed or mentioned therein.

In *Railroad Comm. of Alabama v. Alabama etc.,* 185 Ala. 354, the question which we are here considering was

not controverted and was not discussed. The power of the state to compel all railroads entering a given city to use a union station was conceded. The controverted question was whether the state could compel the railroads to jointly acquire the necessary land and jointly construct the building. The court said, "If the state has the power to which we have referred, *and that power seems to be conceded,* then it has the corresponding authority to put that power into exercise." (Italics ours.)

In *Mayor and Aldermen v. Norwich etc.,* 109 Mass. 103, the question here involved was considered and decided and that case is therefore in point here. But the reasoning of that decision will not commend itself to the court. The power of the state to compel a railroad to extend its tracks so as to reach a union station was predicated upon the reserved power to alter, amend or repeal its charter, and that conclusion is in direct conflict with the decision of this court in *Superior Water etc. Co. v. City,* 263 U. S. 125. It is therefore entitled to no weight whatever as authority here.

In answer to the argument that to require the railroads to expend money in extending their line for the rendition of a service which they had not undertaken to render would amount to a taking of property without compensation, the Massachusetts court said:

> "Their compensation for the outlay is in the tolls they received from travelers or others."

That this theory is unsound is clear from the argument and statement of the court in the *Telephone* case, 166 Cal. 640, where the court said, at pages 686-7:

> "And of course it cannot be contended and is not contended that an apportionment of rates or tolls for a service to be rendered in the future is a compensation for the present taking of property."

Dewey v. Atlantic Coast Line, 142 N. C. 392, is not in point here at all, for it was an action by a group of property owners to enjoin railroads from carrying out an order of the Commission to construct a union station, which order the railroads desired to obey. No further comment on that case is necessary.

Griffin v. Southern R. Y., 150 N. C. 312, is another case of the same sort as the Dewey case and equally irrelevant here.

In *Corporation Comm. v. Seaboard, etc.,* 161 N. C. 270, the sole question reviewed aside from a procedural question was whether the validity of an order requiring two railroads to join in a union station could be attacked upon the ground that the erection of the station at the point designated would take away the business of a rival town. The case is not at all in point here.

The ruling in *Missouri Oil & Gas Co. v. State,* 29 Okla. 640, is rested squarely upon the authority of the Massachusetts case of *Mayor v. Norwich etc., supra,* which, as we have shown, is contrary to the decisions of this court and cannot be accepted as authority here. The Oklahoma court said that this Massachusetts case had been cited with approval in *Northern Pacific v. Dustin,* 142 U. S. 492, but herein the Oklahoma court was mistaken. The Massachusetts case was not cited there at all, and its doctrine was certainly not approved as the decision of this court was quite the opposite of the decision made by the Massachusetts court.

State v. K. C. Railway Co., 32 Fed. 722, is cited as authority by the Oklahoma court, but is entirely out of point. The Kansas City case related only to a union station at a railroad intersection and therefore did not involve the power of the state to compel a railroad to extend its line.

In *State v. St. Louis,* 165 S. W. 491, the question of the power of the state to compel a railroad to extend its lines in order to enter a union station does not appear to have been raised. At any rate, it is not discussed in the opinion.

State v. St. Louis etc., 199 S. W. 829, is the same case at a later stage, and the same comment applies.

Gulf, Colorado & Santa Fe v. State, 167 S. W. 192, is not in point here, because it related to two intersecting railroads and the order of the Commission was construed by the court as requiring them to construct a union station at or near the junction of their lines of railroad.

North Carolina etc. v. Southern, 185 N. C. 435, concerned merely the validity of an order requiring two intersecting railroads to maintain a union station at the junction point. The question of the power of the state to compel an extension of lines was not involved therein.

Chicago etc. v. State, 90 Okla. 173, was a 4 to 3 decision affirming the power of the Commission to require railroads to construct a union station, but did not mention the point we are here considering other than by very general language. The majority opinion said that "the power in question was settled and established by a long line of decisions of this court, both upon the theory that the same was a proper exercise of its police power,

or of the right reserved to the Legislature to amend, alter or repeal the charter of said railroad." But, as we have pointed out above, this theory has been definitely rejected as unsound. The majority opinion in the Oklahoma case also criticized as unsound and refused to follow the decision of the California Supreme Court in the union station case, 190 Cal. 214, which was shortly thereafter affirmed by this court in *Railroad Commission v. Southern Pacific,* 264 U. S. 331.

In *State v. Jacksonville Terminal,* 71 Fla. 295, the court held to be void an order of the Railroad Commission requiring several roads and the Terminal Company to join in the erection of a new, better and larger terminal station upon a site apart from the site of the existing terminal station then in use. The court's conclusion on this point is correctly summarized in the last paragraph of the syllabus, as follows:

> "The statutes do not confer upon the Railroad Commissioners any power that may fairly be regarded as authorizing the Commission to make an order requiring the local terminal company and the railroad companies that are its patrons jointly to change the location of the terminal company's depot or terminal."

It is but fair to add, however, that the court does say in the course of its opinion:

> "There is authority to compel the railroads entering the city to erect, operate and maintain a joint passenger terminal or union depot, even though the effect of such order would be to require the railroads using the present terminal depot to withdraw from it."

That statement, however, was pure *obiter dictum.*

In State *ex rel.* R. R. Commissioners v. Atlantic Coast Line, 67 Florida 441, the constitutional limitations are not discussed.

In Missouri etc. v. State, 38 Okla. 401, no constitutional question seems to have been raised, discussed or decided.

We have now reviewed briefly all of the state cases relied upon heretofore by the City as supporting its claim of power to compel a railroad to extend its main line tracks for the purpose of joining in a union station at a point apart from its existing tracks. Of the cases cited by the City in this connection all but six did not involve this question, and are therefore not in point. Of the six remaining cases, three are in point. In these the courts of Massachusetts and Oklahoma affirmed the existence of this power upon the ground that it is comprised within the reserved power to amend, alter or repeal charters, a theory which has been rejected as unsound by this court and which would in any event be a matter for the exertion of state power and not of federal power where the power to alter or amend the charter is reserved by the state and not by the federal government. In the three remaining cases, the Supreme Court of Alabama and the intermediate court of Texas have assumed the existence of this power, either because it was expressly conceded, or because it was not controverted in the case before them.

IV.

Cases Heretofore Cited by the City From the Reports of This Court Are Not in Point.

Wisconsin etc. v. Jacobson, 179 U. S. 287, involves only an order requiring two intersecting railroads to pro-

vide at the point of intersection facilities for the interchange of cars and traffic.

Denver & Rio Grande v. City etc. of Denver, 250 U. S. 241, is equally irrelevant.

Neither of these cases involve the joint use of main line or any line, the joint use of any facilities, the extension of main line, or the abandonment of lines.

It has been urged that argument on the Fourteenth Amendment was fully presented to this court in *Railroad Commission v. Atchison,* 264 U. S. 331, and that "it is the chief business of that tribunal to pass on just such contentions. If it be true that by reason of any provision of the Federal Constitution no public authority has any power * * * the Supreme Court of the United States would undoubtedly have said so."

On the contrary, our understanding is that this court seldom or never bases a decision on the Fourteenth or any other amendment to or clause of the Constitution if the case can be disposed of on other grounds. In the case just cited, the court found that it could readily affirm the judgment of the state court without solving any problem of constitutional law. What powers the State Commission might have exercised within the limitations of the Fourteenth Amendment would seem to be an academic question if, as we claim, Congress occupied the field by enacting the Transportation Act, 1920.

V.

The Railroad Companies Have Not Admitted That the Interstate Commerce Commission Could Within the Limitations Imposed by the Fifth Amendment Be Vested With the Jurisdiction Which the City Claims That the Commission Possesses.

Carriers are not parties to this proceeding, and it is probably of no importance what positions they take or

have taken in connection with the so-called Union Station proceeding.

In fact, both here and in the State Court we argued quite fully that under the limitations of that amendment the State Commission could not be clothed with jurisdiction to do just what the City here seeks to have the Interstate Commerce Commission do, and our argument as to the State Commission's lack of power under the Fourteenth Amendment applies equally to the possible extent of the Federal Commission's power under the Fifth Amendment. Our argument as to the State Commission's power was, first, lack of power under the Fourteenth Amendment; second, lack of power under the commerce clause and the Interstate Commerce Act, especially Transportation Act 1920. We have never admitted that the Fourteenth Amendment permits the state government or that the Fifth Amendment permits the federal government to force the carriers to do that which is the aim and end of this present proceeding.

VI.

We Therefore Conclude Our Presentation of This Case Under the Limitations of the Fifth Amendment as Follows:

A public utility which has undertaken to render a public service can be required by the government in the exercise of its police power to expend money when necessary to render that service adequate, safe and convenient (subject, of course, to limitations not necessary to particularize here). The government may not require such a public utility to expend money in the rendition of a service other than or different from or in addition to that which

it has undertaken to render. A steam railroad does not undertake to go to its patrons. It undertakes only to serve those who come to it. The undertaking of a railroad in this behalf is defined by the location of its tracks and is limited by its franchise. To require a railroad, for the purpose of joining in a union station or for any other purpose, to extend its tracks to a point apart from its line, necessitating the acquisition of additional property and franchises would amount to a taking of private property for the public use without compensation, a deprivation of property without due process of law, and a denial of the equal protection of the law.

B.

THE CONGRESS HAS NOT ATTEMPTED TO DELEGATE TO ITS COMMISSION THE POWER TO DO WHAT THE CITY ASKED THE COMMISSION TO DO.

I.

The Act to Regulate Commerce Must, if Possible, Be So Construed As to Avoid a Difficult Constitutional Question, Namely, the Question of Power Under the Limitations of the Fifth Amendment.

This is a well-known rule repeatedly applied by this court. The most frequently quoted statement of it is that made by Mr. Justice White in *United States v. D. & H. Co.*, 213 U. S. 366 (408):

> "Where a statute is susceptible of two constructions by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Citing Harriman v. I. C. C., 211 U. S. 407.

The rule was repeated and followed in *United States v. Standard Brewery*, 251 U. S. 210, where Mr. Justice Day quotes as follows from the case of *United States v. Moy:*

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubt upon that score."

In *Texas v. Eastern Texas*, 258 U. S. 204, the court at page 217 quoted the rule as stated in *United States v. D. & H. Co.* The same rule has been quoted and followed scores of times by other federal courts and in the state courts.

II.

Paragraphs 18 to 20 of Section 1 of the Act to Regulate Commerce Do Not Confer Upon the Commission Any Such Power.

Those paragraphs are permissive in character and not compulsory. They were drafted and enacted not in order to compel extensions of lines, but for the purpose of preventing unnecessary and uneconomical extensions. We do not think that the Commission had any authority or jurisdiction to issue any certificates because they were not asked for by the carriers, or any one of the carriers, but this is not the place or time to discuss that proposition. Their permissive character, however, is brought out in *Texas v. Gulf*, 270 U. S. 266, where Mr. Justice Brandeis, at page 272, announcing the opinion of the court, says:

> "Paragraphs 19 and 20 provide that a carrier desiring to construct one (an extension) may apply for a certificate and prescribe the method of proceeding. * * *"

And again the same Justice, in *Cleveland v. United States*, 275 U. S. 406, said at page 408:

> "These paragraphs (18 to 21) relate to the construction, acquisition, extension and abandonment of a railroad. They deal primarily with rights sought to be exercised by the carrier."

It would be inconsistent to hold that the issuance of such certificate is necessary and at the same time to hold that the Interstate Commerce Commission has jurisdiction to *order* all these works to be done, for if the Commission has power to order the things to be done, there is certainly no occasion for issuing any certificates permitting them to be done. It would be as if a man should say to his small son, "You may go to school this morning, Johnny, if you like," and at the same time tell him that he must go to school whether he like or not.

III.

Paragraph 21 of Section 1 Is Not a Source of the Asserted Jurisdiction.

This paragraph has been discussed in that connection at other times and in other places, and with reference thereto we desire to say that when Congress delegates power, or whenever any Legislature delegates power, the delegating body lays down the rule by which the power delegated is to be exercised.

> "When a subject requires legislation for the regulation of future conduct, but the objects of it are so diffuse and variable that they cannot be distinctly apprehended and comprised in the ordinary terms of legislative classification, it is not unusual to prescribe general rules if such do not already exist, and delegate the power to apply those rules to the

varying circumstances which may arise and give occasion for control." *Louisville etc. v. I. C. C.*, 184 Fed. 118, at p. 122.

So the Commission must find in the Act not only a grant of power to require the extensions of lines, but must find also in the Act some general rule as to when and how that power shall be exercised. In other words, it cannot be held for a moment that the Commission has been given *carte blanche* to require existing railroad companies to build— that is, to extend their lines anywhere and everywhere. They can only be required to build or extend their lines in those cases in which Congress has said that they must extend the line. The Commission is to determine in a given case whether the facts impose the duty under the law. As the Commission itself said, the power of the Commission to adjudicate complaints brought before it extend only to such acts or omissions of common carriers as are in contravention of the provisions of the Act to Regulate Commerce. *Lunham v. Railroad Co.*, 48 I. C. C. 611.

In the report made in the *Union Station case*, 100 I. C. C. 421, Mr. Commissioner Hall said, at page 461:

> "Possibly their complaint should be regarded as an application under paragraphs 18 to 20 of Section 1, although I do not think so. Ostensibly it is a complaint under paragraph 21."

And a little later, at page 462, he said:

> "It is only in paragraph 21 that the power to require appears, and there it is confined to car service as the term is used in the Act, and to extension of carriers' lines."

At page 426 the Commission had said that the term "car service" as used in the Act, "relates to *vehicles* used in the transportation of *property*. The authority to require a carrier to extend its line may include authority to require it to construct stations necessary and incidental thereto." The word "thereto" in this sentence seems to refer to car service. The Commission said further, on the same page:

> "We conclude that paragraph 21 does not empower us to order the construction of a union passenger station where, as here, the station would be the principal thing and the extension of lines the incident."

Where paragraph 21 authorizes the Commission to require carriers to provide themselves with safe and adequate facilities for performing car service, we have a definite statement by which to measure the power of the Commission. The Commission is given power to enforce the provision relating to car service, and that term is defined in the Act. Now when the Commission is given in paragraph 21 the further power to require the carriers to extend their lines, it can only be exercised in order to require carriers to perform some duty imposed upon the carriers by some provision of the Act. That is all the power that the Commission has in any case, but we must look elsewhere to ascertain what duties are imposed upon carriers with respect to the extension of their lines. So far as paragraph 21 is concerned, the reading of it would clearly indicate that the extension of lines there referred to was such an extension as might be necessary to the fulfillment of the duties respecting car service, and we take it that paragraph 21, by its terms when properly construed, gives the Commission authority

to require only such extension of lines as may be incidental and essential to the furnishing of car service as defined in the Act.

IV.

The Commission Has No Authority Under Paragraph 3 of Section 3 of the Interstate Commerce Act to Order the Carriers to Construct a Union Passenger Station.

In paragraph IV of the petition for final order [115] filed by the City of Los Angeles, it is urged that the Commission has authority to order the carriers to construct a union passenger station under this paragraph. And, indeed, it is the only one referred to as the basis of jurisdiction in that petition for final order.

The position of the City seems to be that by virtue of the amendment made by the Transportation Act, 1920, the Commission now has authority to make such an order, but did not possess such power theretofore. The particular language of the section relied upon reads as follows:

> "All carriers * * * shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith."

As a matter of fact, however, this language was not changed by the amendment of 1920. The only important change in paragraph 3, which was paragraph 2 prior to the amendment, was the elimination of the clause reading, "But this shall not be construed as requiring any

such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." The reason for this elimination is obvious. Paragraph 4 of the same section was added by the Transportation Act of 1920, and does give the Commission express authority to order one carrier to share its existing terminal facilities with another under defined circumstances. The clause in question had to be eliminated from the old paragraph 2, now paragraph 3, in order to make the latter harmonize with the new paragraph 4.

In cases before the Commission and the courts involving paragraph 3, the question at issue was the power of the Commission to issue an affirmative order requiring a carrier to construct a track connection with another carrier and to interchange business with other carriers, and it was held that the section of the Act under consideration did clothe the Commission with authority to make orders of this character. It is a far cry, however, from ordering a carrier to construct a track connecting up existing facilities to ordering the construction of a new union station costing several million dollars and requiring joint use of several miles of main line.

If the Commission has the jurisdiction claimed for it by the City under paragraph 3 of section 3, then the specific provisions of paragraph 4 of section 3 relating expressly to existing terminals are unnecessary and superfluous, for the greater power conferred by paragraph 3 as so construed would include the less power given by paragraph 4.

The paragraph doubtless confers on the Commission authority to require a connection to be made between two railroad lines, but that is very far from saying that it

confers power on the Commission to require one carrier to grant to another trackage rights or the right to operate cars and trains over the other's lines, and certainly there is no specific provision in the paragraph that the Commission shall have power to require the construction of union stations.

It has been urged that in these proceedings, as reported in 100 I. C. C. 421 (427), the Commission expressly *assumed* that this paragraph makes it the duty of carriers to maintain union station facilities. Certainly the Commission did not make that assumption in the report. What the Commission said amounted merely to this—conceding the *claim* that the paragraph makes it the duty of the carrier to maintain union station facilities, etc. That is, if for the sake of argument we allow that such is the meaning of the paragraph, the Commission must look elsewhere for authority to require the providing of such facilities.

The Commission, in its report of July, 1925 [49], referred [55] to *United States v. Pennsylvania,* 242 U. S. 208. In that case Mr. Justice McKenna says, at page 233:

> "The United States and the Commission insist that they have authority of cases for their two fundamental propositions, to-wit, (1) That it is the duty of the railroad to furnish equipment for the transportation of products, and (2) that the Commission has the jurisdiction to enforce that duty."

Here also counsel assert, first, that it is the duty of the railroads to furnish a facility (a union station) and, second, that the Commission has the jurisdiction to enforce that duty. We submit that there is no difference

in principle in the position of the Commission in the tank car case and that of counsel for the City in the instant case, and that therefore the language of Mr. Justice McKenna affords as complete an answer to counsel's contention as it did to the Commission's contention in the tank car case.

This paragraph 3 deals with the interchange of traffic and of passengers between lines of railway. If it means more than that, if it means that the Commission may compel the Northern Pacific to add 2000 feet of trackage to its team tracks at Dickenson, North Dakota, served by no other line, and may require the C., M. & St. P. at Frederick, South Dakota, served by no other line, to build another freight house, and may require the Illinois Central to enlarge its passenger station at Jackson, Mississippi—if it means all that—then these United States have indeed been a land of neglected opportunity ever since 1887, when the Commission was first clothed with all these powers. For unless the paragraph is limited to interchange facilities, it includes all that we have just suggested and vastly more.

In July, 1888, in the case of *Scofield v. Lake Shore,* 2 I. C. C. 67, the Commission said, at page 76:

> "A careful consideration of this provision of the statute (namely, the paragraph here under consideration) has brought us to the conclusion that it refers only to facilities between connecting lines at terminal points for the interchange of traffic and passengers."

In *United States v. D. L. & W.,* 40 Fed. 101, Judge Wallace said, at page 103, referring to this same provision:

> "This provision refers only to facilities between connecting lines at terminal points for the interchange of traffic and passengers."

This court, in *Railroad Commission v. S. P.*, 264 U. S. 331, seems to have the same view of the meaning of this paragraph, for it says, referring thereto and to paragraph 4 of the same section:

> "It is obvious from the foregoing that Congress intended to place under the superintending and fostering direction of the Interstate Commerce Commission all increased facilities in the matter of distribution of cars and equipment and in joint terminals in an exchange of interstate traffic and passengers between railways so as to make it prompt and continuous."

Whatever powers the Commission may exercise to compel the establishment of a union station must be predicated and based upon the proposition that the interchange of passengers, mail, baggage and express between the three steam carriers at Los Angeles requires the establishment there of a union station. In other words, the Commission may not found its jurisdiction on the esthetic sense of an art loving city, nor on the harmonies and symmetries of a civic center, nor on the desirability of a union station to boost rents in a part of the city or town where they have steadily declined, nor to effectuate the elimination of grade crossings. The Commission's business is confined to transportation and specifically, so far as this case is concerned, to the need of facilities for the interchange of passengers. Now, strange to say, so insignificant a factor is this interchange of passengers at Los Angeles that the complaint filed by the City in the proceedings before the Commission does not once refer to it, nor does the petition for final order.

It was referred to by the Commission itself in its report of July, 1925, as follows (100 I. C. C. 421, at page 441):

> "One of the principal arguments for a union station as contrasted with several stations is that it promotes to a greater extent the convenience of passengers and makes possible the handling of baggage, express and mail in one location.
>
> "The proportion of travelers reaching Los Angeles who transfer immediately to another railroad is not as large as at many cities. Most travelers who come into Los Angeles from a distance stop in the city or its environs for a short time at least, and for them a union station is less important. Applicants presented estimates that 97 per cent of Los Angeles passenger traffic is terminal rather than interchange traffic. For the first ten days of June, 1923, the Santa Fe, the Salt Lake, and the Southern Pacific brought into Los Angeles 41,030 passengers, of whom 824, or slightly over 2 per cent, transferred from one station to another. This does not include persons stopping over in Los Angeles, passengers transferring at Los Angeles but traveling on separate tickets to and from that point, or passengers transferring to and from the Pacific Electric.
>
> "Since the war period the Santa Fe through service between the east and San Francisco has been much restricted. And its through service between San Diego and Los Angeles in Southern California and San Francisco has been discontinued. As a result, there are undoubtedly many more transfers between the Santa Fe and the Southern Pacific at Los Angeles than formerly. The California Commission engineers' investigations indicated that probably ten per cent of the passengers carried by the steam lines normally transferred from one railroad to another. This does not include passengers transferring to or from the Pacific Electric."

It will be noted that the check referred to was made in 1923, long after the close of the war and long after

the discontinuance of passenger service between Los Angeles and San Francisco by the Santa Fe. In fact, so insignificant is the interchange of passengers at Los Angeles that it has long since ceased to be suggested as a possible basis for the Commission's jurisdiction to order a new union station.

It should be emphasized that this paragraph makes no provision for apportionment by the Commission of the expense of construction, of upkeep, of handling, nor for determination of allowance for use of joint trackage, or for regulation of such use. When the Congress contemplates any of these incidents it makes provision therefor. See section 25 (4) (the Panama Canal Act as amended) and paragraph 4 of section 3.

V.

Paragraph 4 of Section 3 Does Not Give the Commission Power to Make the Desired Order.

We assume that counsel for respondent will urge in this court as they did in the court below that the Commission has jurisdiction under this paragraph to make the order sought in this proceeding.

For the convenience of the court, the paragraph is repeated here:

> "If the Commission finds it to be in the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks, for a reasonable distance outside of such terminal of any carrier by another carrier or other carriers on such terms and for such compensation as the carriers affected may agree upon,

> or, in the event of a failure to agree and the Commission may fix as just and reasonable for the use so required, to be ascertained on the principles controlling compensation in condemnation proceedings."

Counsels' claim in this regard is based upon the allegations of paragraph 18 of the petition for writ of mandamus to the effect that one of the carriers, namely, The Southern Pacific Company, is the owner of a portion of the proposed site of the union station at the Plaza, although it is admitted that the remainder of the lands are privately owned. No claim is made, however (as there could not be), that any station now exists upon the premises or that there are any other terminal facilities located thereon.

It seems to us too clear for argument that the language of the paragraph relates only to the joint use of a pre-existing terminal—and a terminal cannot consist merely of a piece of land, however owned. It means land so equipped with buildings or other facilities as to be in actual use as a railway terminal. This is the construction placed upon the paragraph by the Interstate Commerce Commission in its first decision in the proceeding instituted by the respondent, reported in 101 I. C. C. Reports, at page 426, where it is said: "The provision of section 3, paragraph 4, for joint use of terminal facilities expressly covers only facilities existing when the requirement is made." Since there is no terminal on the premises owned by the Southern Pacific, the Commission would have no authority to order that any other carrier be permitted to use the same, much less to require the owner and other carriers to construct a new terminal facility thereon.

But the respondent, due to the stress of necessity, has gone even farther than this and has attempted to stretch the language of the paragraph to give the Commission authority to order the joint use of certain main line tracks severally owned by the carriers independently of the use of the terminals with which such main lines connect. In the paragraph of the petition in question, it is affirmatively alleged in positive terms "That the carrying into effect of the union passenger depot order requested by the City of Los Angeles, as aforesaid, would require to a substantial extent the joint use of existing railroad terminal facilities in or adjacent to the City of Los Angeles, including the following uses—the use by the Southern Pacific passenger trains from the north of the Santa Fe main line tracks on the west banks of the Los Angeles River from a point north of the North Broadway Viaduct as far south as Aliso street; the use by the Salt Lake passenger trains from Pasadena of the Santa Fe's tracks on the west bank of the river between the same points; the use by the Salt Lake passenger trains from the south of the Santa Fe's tracks from Hobart Junction on the south to the site of the proposed union passenger depot on the north, a total distance of approximately 3 miles; and the use by the Southern Pacific of the Salt Lake's tracks on the east bank of the Los Angeles River from Alhambra avenue southerly to Butte street and thence west over the Salt Lake's Butte street line to Alameda street."

The tracks of the Salt Lake and the Santa Fe which respondent says must be jointly used are main line tracks leading to the passenger station sites of those two companies, but no joint use is to be made of the stations themselves.

The Santa Fe tracks are to be used jointly by all the carriers solely for the purpose of reaching the union station site. The Salt Lake tracks are to be used by the Southern Pacific solely for the purpose of transferring its freight trains between the north and south sections of the City. They are not be used as a part of any existing facilities. Neither are the tracks in question tracks located within the terminals themselves. They are, to use the language of the paragraph, "main line track or tracks outside of such terminals." It is our contention that in these circumstances the Commission has no power to compel either the Santa Fe or the Salt Lake to share the use of their tracks with the other carriers. Our position in this regard is founded upon an analysis of the provisions of the paragraph itself.

The Act does not define either "terminal" or "terminal facilities," but we do not think that any specific definition of such terms is required for the purposes of this case. We take it that there will be no dispute that either a passenger terminal or a freight terminal ends and the main track leading thereto begins at the point where the yard tracks of the terminal begin to fan out from the main line track. Certainly it cannot be successfully argued that the passenger terminal of the Santa Fe on the west bank of the river in the vicinity of First street extends as far north as Aliso street, or that the tracks of that company between Aliso and North Broadway viaduct, which it is contemplated shall be jointly used by the Santa Fe, the Southern Pacific and the Salt Lake, are anything other than main line tracks extending outside the terminal. The same is equally true respecting the Salt Lake tracks on the east bank of the river.

Attention is called to the phrase in the paragraph reading "to require the use of any such terminal facilities, *including* main line track or tracks for a reasonable distance *outside of such terminal.*"

The word "including" as here used connotes that the joint use of the main line track may be ordered when, and only when, the terminal to which the track leads is to be jointly used. It wholly negatives the construction which counsel would seek to give it, that the Commission may order *either* the terminal *or* the main line track to be used. The object sought to be attained by the amendment of the section is a matter of common knowledge. It was to authorize the Commission to order that the joint use of certain passenger and freight terminals which had been put into effect while the railroads were under federal control should continue after the roads were returned to their owners and to give the Commission power to put this practice into effect in other parts of the country in the future if circumstances warranted. The joint use of the terminals or terminal facilities, however, was the primary purpose sought to be attained, and the joint use of main line tracks leading thereto was but an incident to the use of the terminal itself. The reason for including the use of the main line as an incident to the terminal is obvious, for had Congress limited the power of the Commission to requiring the use of the terminal itself, and had not included the main line leading to the terminal, the whole purpose of the Act might have been defeated because the terminal might well be so situated that it could not be reached except by use of the main line of the owner thereof.

To place the interpretation on the amendment which counsel for the City have urged would require the substitution of the word "or" for the word "including" so that the clause would read "to require the use of any such terminal facilities *or* main line track or tracks for a reasonable distance outside of such terminal." Had Congress intended to give the Commission power to require the joint use of, first, a terminal, or second, a main line leading thereto, or, third, both, it would have been a simple matter to do so. The clause would then have read, "to require the use of any such terminal facilities or main line track or tracks for a reasonable distance outside of such terminal, or both." But to give the paragraph the construction which will be urged by counsel is to distort its express language and to read into it something that is not there.

We also say that under this paragraph the Commission has not any power to require a carrier *against its will* to make use of the terminal facilities of another carrier. In other words, such power as the Commission has under this paragraph may be exercised only when a carrier applies for an order authorizing it to use the terminal facilities of another carrier. We are aware that the Commission in *Hayes v. C. M. & St. P.*, 69 I. C. C. 489, held that it did have authority at the instance of a third person to require one carrier to use the facilities of another to the extent of having its cars switched by the owner of the terminal. We believe that the construction of the law given that section by the majority opinion in that case is erroneous and that Mr. Commissioner Hall's views expressed in his dissenting opinion correctly stated the law. No order was entered in the case, and so far as we know

no court has construed the provisions of the paragraph so that a doubt at least exists as to the Commission's power to order a carrier against its will to use the terminal of another carrier.

We are confirmed in our view of the scope of this paragraph by the consideration that to compel a carrier to extend its line by joint trackage right or otherwise, so as to reach a terminal which it does not wish to enter would be contrary to the fifth amendment as shown in earlier pages of this brief.

VI.

To Hold That the Transportation Act of 1920 Has Deprived States of Any Power That They May Have Had to Do What Is Here Sought Is Not Tantamount to Holding That the Power Has Been Given to the Interstate Commerce Commission.

It will doubtless be insisted that if the power, whatever it was, "to require in appropriate cases the construction and operation of union passenger stations" has been taken away from the State Commission by the Transportation Act of 1920 it must by the same act have been delegated to the Interstate Commerce Commission. We submit that this is not true either in law or in logic. By the enactment of paragraph 4 of section 3 of the Interstate Commerce Act the Commission, if it finds it to be in the public interests and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities in handling its business, "shall have the power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any car-

rier by any other carrier or carriers on such terms or for such compensation as the carriers affected may agree upon." While this section of the act falls short of authorizing the Federal Commission to order carriers to construct a new union station at a new site not then owned by them, at the same time it is our contention that by the enactment of this law Congress has entered the field of regulation respecting the establishment of union stations to such an extent as to automatically terminate whatever power the state may have had to deal with that subject.

When Congress acts on a particular matter relating to Interstate Commerce and the State Statute is thereby annulled, it is not necessary that the Federal Statute cover the subject as fully and completely as did the state law. If the state act covered the subject more completely or in greater detail or with more particularity than does the Federal Act, nevertheless the state act even in those further details is at an end, and they are not implied or read into the Federal Act. Thus in the case of Smithson v. Atchison, 174 Cal. 148, the plaintiff, a minor, brought suit under the Federal Employer's Liability Act. Now there was a State Statute in effect which prohibited the employment of a minor under the age of 18 between 10 o'clock in the evening and 5 o'clock in the morning, and the injury had occurred at about midnight. The trial court instructed the jury that the state act was applicable because it was not in conflict with the Federal law. The upper court quoted from Prigg v. Penn, 16 Peters, 539 (617):

> "* * * For if Congress have a constitutional power to regulate a particular subject and they do actually regulate it in a given manner and in a cer-

> tain form it cannot be that the State Legislature have a right to interfere, and, as it were, by way of complement to the Legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provision made by it. * * * The will of Congress upon the whole subject is as clearly established by what it had not declared as by what it has expressed."

This same passage is quoted in the very recent case of Chesapeake, etc. v. Stapleton, decided by the court May 27, 1929, October Term, 1928, No. 133. This case cites the Smithson case, *supra,* and reviews several other cases involving the same principle.

In Nor. Pac. Ry. v. Washington, 222 U. S. 370, the action was brought to enforce a penalty under the State Statute prescribing the hours of labor of railroad employees. About a month before the alleged violation of the State Statute Congress had adopted the Hours of Service Act which by its terms, however, did not go into effect until the expiration of a year from its passage; and it was held that the Federal Act although not yet effective put an end to the enforcement of the state law.

Erie, etc. v. New York, 233 U. S. 671, involved the same situation. The opinion says at page 683:

> "Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the hours of service law of March 4, 1907, is the judgment of Congress of the

> extent of the restriction necessary. It admits of no supplement. It is the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it."

Kansas City v. Van Zant, 260 U. S. 459, involved a construction of the provisions of the Hepburn Act relating to the issuance of passes. The Act made no provision in regard to limitation of liability toward persons using passes, but the court said that free passes in their entirety were taken charge of by the Act—not only their permission and use but the limitations and conditions upon their use. The court said that before the passage of the Hepburn Act it had decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence and that no public policy was violated thereby. But that of course would not have been said before the Hepburn Act was passed had the accident occurred in a state which forbade limitation of liability toward holders of free passes. After the passage of the Hepburn Act the court upheld limitation of liability toward users of passes issued under that Act. The court concluded as follows:

> "The pass proceeded from the federal act. It is controlled necessarily in its incidence and consequences by the federal act to the exclusion of state laws and state policies and such is the effect of decided cases."

By taking over a field of interstate commerce for federal regulation the Congress acts and must act on the assumption that with respect to such regulation it is desirable that there shall be uniformity throughout the United States and the only way to secure uniformity is to

exclude state action within that field of regulation and this not only as to the main subject of regulation but as to all the incidents thereof.

Charleston, etc. v. Varnvill, 237 U. S. 597, involved the question whether a penalty act of S. Carolina, making a delivering carrier responsible for the negligence of an acting carrier resulting in loss or damage, conflicted with the Carmack amendment. Mr. Justice Holmes in the opinion said:

> "When Congress has taken the particular subject matter in hand, coincidence is as ineffective as opposition, and a State law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

Before the enactment of the Federal Employer's Liability Act employees recovered under state laws if injured while engaged in Interstate Commerce the same as any other employees in any other business. Workmen's compensation acts would have applied to employees engaged in interstate commerce as well as to others, but ever since Congress occupied the field by its Act, an employee of a rail carrier engaged in such commerce has his remedy only under the Act, and only so far as Congress has provided a remedy. If he is injured by the negligence of his employer or of a fellow employee he may recover, but otherwise he has no remedy under the act because it provides no remedy and he has no remedy under the State Workmen's Compensation law because the remedy under the Federal Act is exclusive; and not expressly so but only impliedly.

New York Central v. Winfield, 244 U. S. 147.

See also:

Erie v. People, 233 U. S. 671;
Sou. Ry. v. R. R. Commission, 236 U. S. 439;
Napier v. Atlantic Coast Line, 272 U. S. 605.

In the case of the Chusan, Fed. cases 2717, 5 Fed. cases 680, at 684, in an opinion by Mr. Justice Story we read:

> "Congress, having power to regulate the whole subject, regulates it as much by what it leaves without any positive regulations, as by what it expressly provides for. The will of Congress is equally expressed in both cases."

See also:

Houston v. Moore, 5 Wheaton 1.

If there ever was power in the state (which we deny) to do the things which are here sought it has not vanished in the air, but it has been taken over by the Congress of the United States which has found it advisable to delegate to the Interstate Commerce Commission certain powers so necessarily affecting and controlling such constructions and creations as are here sought as to displace and terminate any power in the state in the premises, and this displacement and termination have been none the less accomplished although Congress has not seen fit to delegate to its commission the specific power to order and compel such construction and abandonment and joint uses as are contemplated here.

Missouri Pacific v. Porter, 273 U. S. 341, involved a provision of the Interstate Commerce Act relating to bills of lading.

The court says no Act of Congress or order of the Commission prescribed a form of bill of lading for the shipment.

"* * * Section 1, paragraph 6, extends to all carriers and to all transportation subject to the Act. It prescribes a general rule applicable to all regulations and practices affecting the form or substance of bills of lading in order that they may be just and reasonable, and the Commission is empowered and directed to enforce the rule.

"The general regulation of the issuance, form and substance of bills of lading is broad enough to cover contractual provisions like the one involved in this case exempting railroads from liability for loss of shippers' property by fire. Congress must be deemed to have determined that the rule laid down and the means provided to enforce it are sufficient and that no other regulation is necessary. It has power to regulate such commerce, and by its instrumentalities is supreme, and as that power has been exerted state laws have no application. They can not be applied in co-incidence with, as complementary to, or as in opposition to federal enactments which disclose the intention of Congress to enter a field of regulation that is within its jurisdiction."

In St. Louis v. Hesterly, 228 U. S. 702, it appears that the Statutes of Arkansas gave a right of action for damages to a personal representative of one whose death was caused by the negligence of another and also provided that the personal representative of anyone who died as the result of injuries so sustained could recover for the injury and pain suffered by the decedent, as well as for the financial loss to the estate and expressly provided that such cause of action for damages for pain and suffering should survive the death of the injured person. The Act of Congress of 1908 was entirely silent upon the question whether or not the cause of action for injury, pain and suffering would survive the death of the injured employee. It was argued there that inasmuch as the Federal Statute was silent upon the particular subject of the survival of

such cause of action it left the State Statute on this subject unimpaired. It was contended that the State Statute was not in conflict with but supplemented the Federal Statute. But the court held that the omission of Congress to provide for survival of this cause of action was just as significant as were the express provisions which were included in the act of Congress.

So here it cannot be argued that because the power of the state whatever it was, has been taken away, that same power must have been delegated to the Interstate Commission. On the contrary, the correct theory is that Congress has occupied the field, thereby abrogating the power of the states and delegating to the Interstate Commerce Commission such powers and *only such powers* as Congress saw fit to delegate in the field which it had occupied.

The situation is neither novel nor unusual, it occurs not only under the Commerce clause but in other fields of the Federal Government's activities; it has been noted and treated as something to be expected under our Federal system in numerous cases ever since 1820.

VII.

The Court in Railroad Commission v. Atchison, etc., 264 U. S. 331, Did Not Hold That the Interstate Commerce Commission Had the Jurisdiction Here in Question.

In the first place, the jurisdiction of the Federal Commission was not an issue in that case. The only question was the power of the state and the Chief Justice so says early in his opinion:

> "The question in this case is whether the State Railway Commission of California has power to re-

> quire the Southern Pacific Company, the Atchison, Topeka and Santa Fe Railway Company, and the Salt Lake and Los Angeles Railway Company to build an interstate union depot in the city of Los Angeles."

That was indeed the question, and the only question in that case. Anything in the opinion about the Interstate Commerce Commission or its powers was said either *arguendo* or as *obiter dictum*. The point decided, and the only point decided by the court was that the State Commission did not have power to make the order which it attempted to make.

In the second place, no member of the Interstate Commerce Commission could find, either in the decision or in the language of the Chief Justice's opinion, any clear declaration of jurisdiction in the Interstate Commission to do what the appellant asked. Counsel for the City seems to have admitted in the proceedings before the Commission that this opinion left the situation uncertain. This appears from Mr. Commissioner Eastman's concurring opinion where he says, at the close thereof (142 I. C. C. 489, at p. 501):

> "Certainly a conclusion that we have no power to enter an order is at least subject to much doubt. Certainly also the carriers propose to litigate this case as long as and as vigorously as they can. The least possible delay in determining legal questions and arriving at an end of litigation will result, I believe, if we as well as the State Commission enter an order. *This aspect of the matter was strongly and persuasively presented by complainant.*" (Italics ours.)

Mr. Commissioner Eastman also quoted from the opinion of the Supreme Court as follows:

> "Our only question here is whether the power to direct a new union station with its essential incidents is committed exclusively to the Interstate Commerce Commission under the Act of 1920."

And Mr. Eastman says it cannot be said that this question was clearly answered. Counsel for the City then thought the law of the case was sufficiently uncertain to justify the Commission in "taking a chance." Doubtless they will now insist that it is sufficiently certain to require the issuance of a writ of mandamus.

As we read the decision, the reason given for holding that the state of California could not make the order which its Commission had tried to make was that Congress, by the Interstate Commerce Act and especially the Transportation Act 1920, had taken control of railroad extensions and abandonments and railroad financing to such an extent and degree as to make action by the Federal Commission imperative before such extensions, abandonments or financing could be accomplished. Whether the powers of the Federal Commission with respect to extensions are compulsive or permissive, or when compulsive and when permissive, the opinion does not say. Certainly no one yet has pointed to any word in the Acts of Congress authorizing the Federal Commission to compel the abandonment of Southern Pacific train service on three miles of Alameda street in Los Angeles. The opinion does not say that the Federal Commission has either permissive or compulsive powers with respect to joint use of main line or any other tracks except for the specific purpose of reaching a terminal under paragraph 4 of section 3. The opinion does not say or intimate that a company *may be compelled* to use the trackage of another company for any purpose under any section of the Act.

When the opinion speaks of the fostering guardianship and control of the Commission it seems to suggest permissive rather than compulsive power. Certainly the power is merely permissive over the issuing of securities, construction of lines and abandonment of lines. The opinion refers to the fact that *no specific provision is made for supervision of union stations by the Interstate Commerce Commission.*

The opinion with respect to paragraph 4 of section 3 says that the Act contemplates the compulsory sharing of one company's terminals with one or more companies as a permanent arrangement. This would seem to indicate that paragraph 4 of section 3 relates only to some existing terminal which is to be jointly used by some other company and by the owner of the terminal. It says also it gives the Interstate Commerce Commission the power and duty where the public interest requires to make out of what is the passenger and freight station of one interstate carrier a union station or depot. Where the opinion a little further down says that the court thinks that "means of control over installation of such new union stations for interstate carriers is given to the Interstate Commerce Commission" that seems rather to indicate permission rather than compulsion, and where the opinion says that a certificate of the Interstate Commerce Commission is necessary in the construction of a new interstate union station involving a substantial extension of tracks the language would seem to indicate that the Commission has no power to order in a union station because, as we have already said, if the Commission has that power, it would be superfluous to issue certificates of convenience and necessity in connection with the work.

Then we come to the following language (100 I. C. C. 421, at p. 429):

> "But there is a great difference between such relocation of tracks or local union station and what is proposed here. The differences are more than that of mere degree. They and their consequences are so marked as to constitute a change in kind. They come within paragraphs 18 to 21 of section 402 and require a certificate of the Interstate Commerce Commission as a condition precedent to the validity of any action by the carriers or of any order by the State Commission."

Now, if it was thought that the Interstate Commission had power to make the order which respondent asks for, why speak of an order by the State Commission?

Again, how is to be explained the following from page 347:

> "To be sure this provision (as to issuance of securities) only becomes operative when securities have to be issued and would not of itself prevent action by a State Commission until such securities are seen to be necessary."

Near the close the opinion remarks on the fact that the City of Los Angeles had filed a petition with the Interstate Commerce Commission asking for an order to provide, maintain and use a union station; and says: "For the reasons given, we think the course taken by the City of Los Angeles was the correct one." But the reasons given as indicated by the next following sentence were that before the extensions could be built or the joint use of the trackage compelled there must be at least permissive action by the Interstate Commerce Commission. So, it says, until the Interstate Commerce Commission shall have acted under paragraphs 18 to 21 of section 402 of the

Transportation Act the respondent railways cannot be required to provide a new interstate union station and to extend their main tracks thereto. It does not say "until the Interstate Commerce Commission shall have *ordered* the carriers to provide the union station" but only "until the Interstate Commerce Commission shall have *acted*" under those three paragraphs. This language would just as well sustain our position that the jurisdiction of the Commission to issue certificates for extensions, joint use and abandonments can only be set in motion or invoked by the carriers themselves.

VIII.

The Ruling Made Against Its Own Jurisdiction by the Interstate Commerce Commission Is Entitled to Great Weight.

Pennoyer v. McConnaughty, 140 U. S. 1;
U. S. v. Cerecedo, etc., 209 U. S. 338;
U. S. v. Reynolds, 250 U. S. 104.

The case was heard twice by the Interstate Commerce Commission and each time *en banc*. In the earlier report, 100 I. C. C. 412, ten of the 11 Commissioners participated and all of them were in agreement that the Commission did not have jurisdiction to order the creation of the union station. The names of the ten Commissioners were: Atchison, McChord, Meyer, Hall, Eastman, Esch, Campbell, Lewis, Cox, McManamy. Of these Mr. Esch was a member of the House of Representatives at the time when Transportation Act 1920 was enacted and for some years before; was chairman of the committee in charge of that bill in the House and it was generally known as the Esch-Cummins Bill.

It will be noted that the three members of the Commission who dissented from the second report (142 I. C. C. 489), were among those who joined in the earlier report in holding that the Commission did not have jurisdiction.

In the report following the second hearing we understand that Commissioners Taylor, Brainerd and Porter participated and these three new Commissioners all agree that the Commission did not have jurisdiction to make the order.

So we have at least thirteen Commissioners holding once that the Commission did not have jurisdiction. Several Commissioners holding twice against jurisdiction, and only three Commissioners holding first that the Commission did not have jurisdiction and later that it did have jurisdiction.

Even these three admitted the doubtfulness of the right which they at first denied and later affirmed. Their concurring opinion was written by Commissioner Eastman (140). He first said (141):

> "That the question of the Commission's power was not clearly answered by the opinion of the United States Supreme Court."

He then said (142):

> "Whether or not we have the power to enter an order is not free from doubt, but I believe that from paragraph 21 of section 1 and paragraphs 3 and 4 of section 3 such power may be derived. Possibly no one of these paragraphs fully covers the ground,

but they so supplement each other that when taken together their individual deficiencies disappear."

And further on (145) he said:

"My conclusion is that considering the various statutory provisions together we *probably* have power to enter the desired order. But this is not the only reason for such action. Certainly a conclusion that we have no power to enter an order is at least subject to much doubt; certainly also the carriers propose to litigate this case as long and as vigorously as they can. The least possible delay in determining legal questions and arriving at an end of litigation will result, I believe, if we as well as the State Commission enter an order. This aspect of the matter was strongly and persuasively presented by complainants *in view of the manifest uncertainty as to what the law is;* it is a course which we are quite justified in following, and the one which is most likely to result in a *needed clarification of the law.*" (Italics ours.)

It would seem that if reasonable weight is given to the construction placed upon the statute by the Commission charged with the administration of the statute this is not a case in which *mandamus* ought to issue, especially in view of the well established rule that *mandamus* will not issue in cases of doubtful right.

U. S. *Ex Rel* Arant v. Lane, 249 U. S. 367 (371).

Both upon the constitutional question arising under the fifth amendment and upon the question of statutory construction we respectfully submit that we have advanced

argument and authority requiring reversal of the judgment of the Court of Appeals.

Dated September 2nd, 1929.

A. S. HALSTED,
C. W. DURBROW,
FRANK KARR,
Pac. Elec. Bldg., 6th and Main Sts.,
Los Angeles, California;

ROBERT BRENNAN,
E. W. CAMP,
560 South Main St.,
Los Angeles, California,
Amici Curiae.

APPENDIX.

1.

Civil Code of California, Sec. 291.

The articles of incorporation of any railroad, wagon road or telegraph organization must also state:

(1) The kind of road or telegraph intended to be constructed;

(2) The place from and to which it is intended to be run and all the intermediate branches;

(3) The estimated length of the road or telegraph line;

(4) That at least ten per cent of the capital stock subscribed has been paid in to the treasury of the intended corporation.

2.

Civil Code of California, Sec. 465, subdivision 4.

Every railroad corporation has power: (4) to lay out its road not exceeding ten rods wide and to construct and maintain the same with one or more tracks and with such appendages and adjuncts as may be necessary for the convenient use of the same.

3.

Civil Code of California, Sec. 465, subdivision 5.

Every railroad corporation has power: (5) to construct their roads across, along or upon any stream of water, water course, roadstead, bed, navigable stream, street, avenue or highway, or across any railway, canal, ditch, or flume which the route of its road intersects, crosses or runs along, in such manner as to afford security for life

and property; but the corporation shall restore the stream or water course, road, street, avenue, highway, railroad, canal, ditch or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise.

4.

Civil Code of California, Sec. 470.

No railroad corporation must use any street, alley or highway or any of the land or water within any incorporated city or town unless the right to so use the same is granted by a two-thirds vote of the town or city authority from which the right must emanate.

5.

Statutes and Amendments to the Code of California 1925, p. 1024, Chapter No. 5, Senate Current Resolution No. 2, approving the charter of the City of Los Angeles, state of California, voted for and ratified by the qualified electors of said City of Los Angeles upon a special municipal election held therein on the 6th day of May, 1924.

Article I, Sec. 3, subdivision (8) (a), page 1032:

The city may grant franchises for fixed terms, permits or privileges, for the construction and operation of plants or works necessary or convenient for furnishing the city and its inhabitants with transportation, communication, terminal facilities, water, light, heat, power, refrigeration, storage, or any other public utility or service; may prescribe the terms and conditions of any such grant, and may prescribe by ordinance approved by a vote of the people the method of procedure for making such grant,

subject to the limitations elsewhere contained in this charter; except that the Council shall adopt an ordinance which shall establish the procedure for granting to the holder of an existing franchise, any franchise required for an extension of facilities, ordered by the city, as authorized in paragraph (c), of this subdivision, or for granting a new franchise for a period not exceeding 10 years, to replace a franchise about to expire, as authorized in paragraph (d) of this subdivision; provided that such procedure ordinance and every ordinance granting any such franchise shall be subject to the referendum. * * *

(d) No fixed term franchise, permit or privilege for the construction and operation of plants or works necessary or convenient for the furnishing of the city and its inhabitants with transportation, communication, terminal facilities, water, light, heat, power, refriegration and storage, or any other public service, shall be made for a period exceeding twenty-one (21) years, except in the case of franchises for the construction and operation of subways and elevated railways, as hereinafter provided, and no such grant for the extension of an existing utility, operating under a franchise granted by the city or county, shall be made for a period beyond the expiration date of the franchise, under which such utility or the portion of such utility with which such extension is to be connected, is held or operated, nor in any case for a period longer than twenty-one (21) years. The city may, by ordinance, five (5) years or less prior to the expiration of any franchise, grant to the holder of such franchise a new franchise to replace such franchise about to expire, such new franchise to run for a period not to exceed ten (10) years from the date of expiration of the franchise it replaces.

All such franchises so granted shall be in accordance with the procedure ordinance at the time in force, and shall carry all the conditions required in the original franchise. No fixed term franchise, permit or privilege for the construction or operation of elevated railways or subways shall be granted for a period exceeding forty (40) years for the original franchise, or for a period exceeding ten (10) years for a franchise to replace a franchise about to expire.

6.

Constitution of California, Art. XI, Sec. 19.

Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service, or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such service to inhabitants outside its boundaries, provided that it shall not furnish any service to the inhabitants of another municipality owning or operating works supplying the same service to such inhabitants without the consent of such other municipality, expressed by ordinance.